

1516332 (Migration) [2016] AATA 4475 (4 October 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Joshua Stolp

CASE NUMBER: 1516332

DIBP REFERENCE(S): CLF2014/108848

MEMBER: Suzanne Carlton

DATE: 4 October 2016

PLACE OF DECISION: Adelaide

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 of Schedule 2 to the Regulations;
- cl.820.221 of Schedule 2 to the Regulations; and
- r.2.03A.

Statement made on 04 October 2016 at 2:01pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 13 November 2015 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 7 August 2014 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy r.2.03A and cl.820.211 because the delegate was not satisfied that the applicant evidenced having been in a de facto relationship with his sponsoring partner for the 12 months prior to the application.
4. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. The issue in the present case is whether the parties were, at the time of application, in a de facto relationship and had been in that relationship for at least six months.

SPOUSE/DE FACTO (cl.820.211(2)(a), (3)(e), (4)(e), (5)(e), (6)(d), cl.820.221)

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

6. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

7. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
8. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
9. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship, including joint ownership of assets, and joint liabilities; the extent of any pooling of financial resources, any legal obligations owed to the other party; and any sharing of day-

to-day household expenses. The evidence provided indicates joint rental premises and limited joint assets, consistent with the ages and finances of the parties. This evidence pre-dates the application by about 12 months.

10. The Tribunal has had regard to the evidence provided relating to the nature of the parties' household, including any joint responsibility for the care and support of children, the parties' living arrangements; and any sharing of housework.
11. The parties have evidenced cohabitation and shared household duties, dating back 12 months prior to the date of application. The Tribunal is satisfied that the parties live together.
12. The Tribunal has had regard to the evidence provided relating to the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
13. The parties have evidenced recognition of their relationship by both families, as well as by friends. They have declared the relationship to government agencies in circumstances where it was not beneficial for them to do so. The parties have travelled together and undertaken social outings together.
14. The Tribunal has had regard to the evidence provided relating to the nature of persons' commitment to each other, including the duration of the relationship; the length of time they have lived together; the degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term. The Tribunal notes that the parties have evidenced their commitment to one another and have evidenced a mutual commitment to a shared life to the exclusion of others.
15. The Tribunal is satisfied that the parties are not related by family.
16. The Tribunal is satisfied that the parties have evidenced a genuine and continuing relationship.
17. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time of application and decision.

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

18. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).
19. The Tribunal is satisfied that both parties were at least 18 years old at the time of application.
20. The Tribunal is satisfied that the relationship existed for at least 12 months before the visa application.
21. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.

22. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221.
23. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

24. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211 of Schedule 2 to the Regulations;
 - cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A.

Suzanne Carlton
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).